IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 12TH NOVEMBER 2007 / 21ST KARTHIKA 1929

CRL.A.No. 1719 of 2004()

SC.1963/2002 of I ADDL. SESSIONS COURT, KOLLAM
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APPELLANT: ACCUSED:

SANTHOSH KUMAR, S/O. HARIDASAN,
SAJI BHAVANAM, PARAVATTOM WARD,
PUNALUR VILLAGE.

BY ADV. SRI.V.V.RAJA
SRI.M.T.SURESHKUMAR

RESPONDENTS: COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.NOBLE MATHEW

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA,JJ.

Crl.A.NO.1719 OF 20O4

Dated this the 12th day of November, 2007

JUDGMENT

Hema, J.

The appellant was convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.3,00,000/- and in default to undergo simple imprisonment for three years for offence punishable under Section 302 IPC. Set off is allowed under Section 428 Cr.P.C. The fine, if realised, is directed to give to PW2 and PW3, the widow and mother-in-law of the deceased Jayamohan, in equal proportion. The said conviction and sentence are challenged in this appeal.

2. According to prosecution, on 20.4.2001 at about 2 p.m, motivated by previous enemity on account of difference of opinion in the matter of sand mining, the accused abused the deceased Jayamohan while he was on his way to his house from his shop. The accused also stabbed him on the back and the neck with the knife, MO1 and inflicted injuries, consequent to which, he died on the

same day, before he reached the hospital. The incident happened in front of the house of the deceased. The first information statement was given by PW1, the brother-in-law of the deceased, who reached the scene, on being called by PW2, who is his sister as well as the widow of the deceased Jayamohan. After, investigation, a charge sheet was laid against the accused under Section 302 IPC.

3. The prosecution examined Pws 1 to 14, marked Exhibits P1 to P9 and MO1 to MO4 on its side. The accuse did not adduce any evidence, but marked Exhibits D1 to D5. The accused only denied the allegations and pleaded innocence, while he was examined under Section 313 Cr.P.C. But, he put forward a case on private defence and also an alternative plea under Exception 4 to Section 300 IPC, during trial and at the time of arguments.

4. The court below, on an analysis of the evidence, found that Pws 2 and 3 who are the eye witnesses to the occurrence are believable. Their evidence is found to be supported by medical evidence and other circumstantial evidence, such as recovery of weapon etc., and on the basis of such evidence, entered a conviction against the accused. The plea of private defence etc. was, however, rejected.

5. Pws 2 to 7 are the occurrence witnesses. Out of this, PW4 to PW7 the independent witnesses turned hostile to the prosecution. They flatly denied having seen any incident and their evidence is of no use to the prosecution. Pws 2 and 3, the widow and her mother supported the prosecution in entirety and gave evidence corroborating each other, in all material particulars.

6. PW2 gave evidence that the incident occurred on 20.4.2001 at about 1.45 pm close to her house. The deceased Jayamohan, her husband and children were residing together in her house. The deceased Jayamohan was running a provision store nearby. He was also owning a country boat which was rented out for sand mining. The accused was also engaged in sand mining. On several earlier occasions, the accused had come near the house of the deceased and abused due to some fight in respect of said mining. On the crucial afternoon, when the accused was coming back, after closing his shop to his house, PW2 was present at the junction. The accused then, started abusing the deceased Jayamohan, asking why he had given a case against him. The deceased asked him not to abuse him, while the accused aimed a blow at him and the deceased attempted to prevent the same. The accused then, pushed

him down and he fell down, while the accused took MO1-knife and stabbed him on the backside. The accused got up and went to the accused to beat him. The accused then caught hold of him and stabbed him on his throat. The accused's watch broke and fell down. The deceased sustained injuries and sat down. At the time of incident, mother and her son were present. The accused ran away towards the west, carrying the knife MO1. The deceased was taken to the hospital by her brother, PW1 and others. The deceased was reported dead at the hospital. She identified MO1 as the knife used by the accused to stab the deceased.

7. PW3 also gave evidence more or less consistent with the version given by PW2. She deposed that PW1 and PW2 are her children and the deceased was PW2's husband. She stated that the deceased was stabbed on 20.4.2001 between 1.30 pm and 2 pm. While she was standing in the courtyard of their house, the accused had pelted stones to the courtyard in the afternoon. The deceased was then coming to the house with his son, after closing the shop. When he reached near the house, the accused started abusing him. The deceased asked him why he was abusing and following this, there was a push and pull and the deceased was pushed down and

the accused stabbed him with MO1 on the back. PW3 rushed to the scene and asked him not to stab, while he again stabbed him on the neck with MO1. She stated that the knife used for the offence resembled MO1.

8. According to learned counsel for the accused-appellant, Pws 2 and 3 are close relatives of deceased. Therefore, implicit reliance cannot be placed on their evidence to base a conviction against the accused, especially in the absence of independent corroboration. This argument can only be rejected because PWs 2 and 3 are only natural witnesses to the occurrence and there is no rule that the evidence of close relatives must be discarded for that reason alone. There is also nothing in evidence to infer that they are perjuring before court. The incident occurred near their house, where deceased Jayamohan was residing with his family and they are only natural witnesses to the occurrence. There is nothing in their evidence to show that they have any motive to falsely implicate the accused in a case of this nature and deliberately secure a conviction against him. As per the defence set up during cross-examination, there is no absolute denial of the incident, but the incident is more or less admitted and the accused put forward a plea of self-defence.

According to learned defence counsel, PW2 did not correctly state the manner in which the incident started, developed and ended. They allegedly suppressed the genesis of the incident, it is argued.

9. It was contended that the evidence of Pws 2 and 3 would suggest that the injuries on the deceased were sustained while the accused acted in exercise of private defence. Though the accused did not raise a specific plea of self-defence while questioned under section 313 Cr. P.C., such a case is set up by the defence during cross-examination and at the time of hearing, based on certain admissions made by the witnesses and other circumstances. While questioned under Section 313 Cr.P.C., the accused only denied the incident and stated that he is innocent of the allegations made. He has not given the other version regarding the manner in which the incident happened but, a case is developed only by arguments.

10. To appreciate the rival contentions rasied by the prosecution and the defence, therefore, there is no material available except the arguments advanced by the defence that the incident occurred during a scuffle etc. This court is left to presume the other possibility of the incident, without any specific statement from the accused regarding the incident. The accused is depending on certain circumstances brought out in

evidence in support of the plea developed in cross examination and at the time of arguments. Of course, certain facts are brought out in cross examination, but the question is whether those would be sufficient to give the benefit to the accused, to hold that he acted in exercise of his right of private defence.

11. One of the circumstances which learned counsel for the accused pointed out is, the admission made by PW2, who is none other than the widow of the deceased that the accused sustained an injury. It was also argued that PW2 herself admitted that the deceased had beaten the accused and the stabbing occurred only subsequent to such beating. It is true that these facts were admitted by PW2 in the cross-examination. But the evidence of a witness cannot be torn out of context to make any conclusion either against the prosecution or in favour of the defence. The evidence has to be read as a whole to find out whether it supports the defence plea or not and it probabalises the defence set up by the accused.

12. While doing so, it cannot be said on the basis of evidence that the deceased was the aggressor and that the incident happened only because the accused was beaten by the deceased or in the course of a scuffle, while the accused acted in exercise of his private

defence. It is only natural that some push and pull will be there when the assailant acts in the manner alleged by the prosecution, while the deceased may try to evade the attack and also resist the same or drive away the assailant. But it cannot be said that the deceased is the aggressor for those reasons alone.

13. The broad probabilities have to be taken into account to reach a conclusion whether the deceased was the aggressor and whether the accused was acting in exercise of right of private defence etc. While doing so, the plea advanced by the accused can only be rejected. As per the evidence, the incident happened almost in front of the house of the accused. There was no special reason for the accused to go to the said place on the date of occurrence. The evidence reveals that the incident started when the accused abused the deceased by asking why he had given a case against him. There is also satisfactory evidence to show that there was previous enemity for the accused towards the deceased in respect of sand mining.

14. Taking all these facts into consideration, it appears that the accused had gone to the deceased and picked up a quarrel from a place at a close vicinity of the accused's house since the accused was infuriated against the accused for giving case against him.

These facts would point to the possibility of the accused being the aggressor and not the deceased. So, if at all the accused had beaten the deceased during the incident, it cannot be said that he was the aggressor. The evidence of PW2 further discloses that the accused had to go to the opposite direction to reach his house and there was no reason why he should go near the deceased's house on the crucial day. Learned counsel for the accused however, argued that as per the admission made by PW2, the accused has to go through the place of occurrence to reach his house.

15. But, on a close reading of the evidence of PW2 this argument cannot be accepted. PW2 deposed that the accused has to go towards the southern side of the junction to reach his house, whereas the house of the deceased is situated on the northern side of the junction, at some distance away from the junction towards north (vide plan also). The accused has absolutely no explanation as to why he had gone to the place of occurrence, which is situated just in front of the deceased's house, where he was residing with family.

16. It is true that PW2 stated that the accused had sustained an injury. It has come out from her evidence that the deceased had caught hold of the accused by his hand when he attempted to stab

him. It is also stated by her that the accused's watch had broken and fallen down at the scene of occurrence. It may be possible that the accused would have sustained an injury in the course of such an incident, may be, by forcible contact with some rough portion of a hard object like the broken watch. This fact itself explains that the injury on the accused. PW2 has only fairly admitted that the accused was injured and not suppressed it. It is also well-settled that the prosecution is not bound to explain minor injuries on the accused.

17. There is nothing on record to show that the accused had sustained any serious injury so as to exercise his self-defence, by attacking the deceased till he is done away with. The accused himself has no specific case that he had sustained any serious injuries, in the course of the incident, pursuant to which he had exercised his private defence. If, as a matter of fact, the accused sustained any serious injury of considerable nature, it is only probable and natural that he would go for medical aid. Even if he does not go to a doctor, he would have filed a complaint before the police against the assailant. But, neither of these has happened. He had not gone to the doctor, nor had he gone to the police to lodge any complaint. It is also to be noted that he had not told the

Magistrate at the time of his remand that he had sustained an injury of a vital nature and that he needed medical attention. He had also no case before the Magistrate that the police was making attempts to suppress the injury, with a view to destroy his defence, even while he was asked by the Magistrate whether he had any complaints.

18. In such circumstances, only because there was scuffle, in the manner admitted by the eye witnesses, it cannot be said that the accused was exercising his right of private defence or that the deceased was the aggressor. It is only natural that in any quarrel, there will be exchange of words, push and pull and attempts to evade or prevent the attack etc. There will be possibility for the accused to sustain minor injuries also. But, that is different from making a deliberate attack, as alleged by the eye witnesses. There is no reason to disbelieve PW2 or PW3 or discard their evidence in toto.

19. Learned counsel for the accused-appellant argued that there are some contradictions in the evidence of PW2 and PW3 regarding the genesis of the incident. It has been brought out in evidence that as per their earlier version, the deceased had come out of the house, immediately prior to the incident, but PW2 and

PW3 deposed in court, that the incident happened while the accused was going to his house, after closing the shop. So also, the details in respect of the actual incident as to how it started and developed also, there are some minor contradiction which are not quite vital. Though there are some minor contradictions in the exact nature in which the incident happened, it cannot be given undue significance.

20. When an incident of this nature happens in the manner alleged by the prosecution, it is only natural for even any truthful witness to make some discrepancies and contradictions in the evidence. It can happen due to the variations in the power of observation, retention, reproduction, the memory power etc. But, those cannot be blown out of proportion to hold that the incident did not occur at all, or that the witnesses were suppressing actual incident or the genesis of the incident and speaking falsehood before court.

21. Learned counsel for the appellant also argued that the prosecution is suppressing the earliest version before the court. It was brought out from the cross-examination of PW2 that she had given a statement to the police at about 2 PM, on the same day, immediately after the incident, when the police reached the place of

occurrence on getting a telephone call. She stated before the court in the cross-examination that she had signed that statement also. Therefore, it was argued that the said statement ought to have been treated as the first information statement, based on which an FIR ought to have been registered. But, the said statement is deliberately withheld and another statement was procured from PW1 to register an FIR, it is argued. The earliest version of the incident is held back deliberately and Ex.P1 was fabricated subsequently, is the argument.

22. But, it is difficult to accept this argument. The court cannot jump to a conclusion that PW2 had, as a matter of fact, given a statement as stated by her, solely based on her own evidence. PW12 is the Sub Inspector of Police who registered the FIR, ExP1(a) in this case. PW13 is the investigating officer, who prepared the Inquest Report, scene mahazar and taken other steps of investigation. But, PW12 and PW13 denied having taken any statement from PW1 or having gone to the scene at 2 PM on the date of occurrence, as stated by PW2. In the light of this inconsistency, it is not possible to positively conclude that PW2 had given a statement prior to the registration of FIR Exhibit P1(a), especially in the absence of anything on record to show any undue

interest for the police to help the victim or any motive against the accused.

23. Nothing has been brought out from the evidence of PW12 and PW13 as to why they should create false evidence against the accused in this case. No undue interest in favour of the prosecution or any motive for these witnesses to implicate the accused falsely in a case of this nature is revealed from the evidence. This is a case where no serious allegations, except general allegations, are made against investigation. On analysis of the entire evidence, it cannot be said that the investigators had any reason to fabricate an FIR, in suppression of an alleged first information statement given by PW2.

24. In this context, it is most relevant to note that the first information, Ex.P1 was given within two-and-a-half hours of the incident. The incident happened at 2 PM and the FI statement was given on the same day at 4.30 PM by PW1. There was hardly any time for the police to fabricate any evidence against the accused and there appears to be none interested to do so. It cannot also be said that any delay was caused in registration of the crime, for shaping a case to suit the present prosecution case. The FIR was registered within 2 ½ hours of the incident.

25. A reading of the evidence of PW1 and Exhibit P1 would

show that almost all the details regarding the incident which would corroborate the evidence of the eye witnesses were stated at the earliest point of time by PW1 in Exhibit P1. The fact that PW2 and PW3 are the eye witnesses, the fact that the accused was found running towards the west with a knife, the fact that the deceased was found lying in front of his house having sustained injuries etc., are all revealed from the first information statement, Exhibit P1 itself. It is recorded within 2 ½ hours of the incident. In such circumstances, there is no reason why Exhibit P1 should be discarded as a fabricated document, in suppression of the actual first information statement, allegedly given by PW2 to the police.

26. The medical evidence also corroborates the evidence of eye witnesses. PW8 doctor, who conducted the autopsy has given evidence that there were two injuries, out of which, one of the injuries is necessarily fatal. One injury was at the backside and the other injury was on the neck and the evidence of PW8 corroborates the evidence of PW2 and PW3. PW1 has also stated that he found the deceased with bleeding injuries at the back as well as the neck. Learned counsel for the appellant argued that the evidence of doctor does not disclose that any one of the injuries was sufficient in the ordinary course of nature to cause death so as to attract a charge of

murder. We are unable to accept this argument because the doctor has stated that the one of the injuries is necessarily fatal.

27. On going through the evidence of PW8, and the description of the injury in his evidence and also the postmortem certificate Exhibit P5, it is clear that the injury could be necessarily fatal, as stated by the doctor. The severity of the injury which is necessarily fatal is much more serious than the injury which would, 'in the ordinary course of nature be sufficient to cause death'. Therefore, it cannot be said that no charge of murder is attracted.

28. Learned counsel for the appellant also submitted that even if the entire prosecution case is accepted, the case falls only under Exception 4 to Section 300 IPC. Under Exception 4 to Section 300 IPC, culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. On the facts of this case, it cannot be said that the incident occurred in a sudden fight, in the heat of passion upon, without premeditation etc. In all probabilities, the accused knew that the deceased was working nearby and he would go home for lunch. The accused was present at the junction while the deceased was returning to his house. All these would

indicate that the accused might have been waiting for the deceased, motivated by the enmity to pick up a quarrel and attack him. There is no explanation from the accused why he was at the junction at the time of occurrence.

29. As per the evidence, the accused questioned the deceased why he had given case against him. Therefore, from the facts revealed from the evidence, this case does not fall under Exception 4 to Section 300 IPC. Even if there was quarrel as alleged by the defence, there is no reason why the accused should inflict the injury on the neck which, to his knowledge may turn out to be fatal. The accused had inflicted not one injury, but two injuries, one on the back and another on the neck, out of which one was necessarily fatal. There is also no reason why he should use a knife in the course of the incident.

30. Learned counsel for appellant cited a decision reported in ***Sandhya Jadhav v. State of Maharashtra*** ((2006)4 SCC 653) in support of his argument. But, we find that the said decision is not applicable to the facts of this case. There is also evidence to show that the knife, MO1, the weapon used for the offence was recovered from a place, pointed out by the accused and reliance was placed by the court below on the evidence relating to the recovery of knife.

There is no reason to discard such evidence. Taking all the facts and circumstances into consideration, we find that the conviction under section 302 IPC can only be confirmed and the offence does not fall under Exception 4 to Section 300 IPC.

31. However, it is seen that a fine of Rs.3,00,000/- was imposed under Section 302 IPC. Considering the circumstances of the accused, on the facts of this case, we find that the fine is excessive and it requires interference. Rs.50,000/- would be sufficient to meet ends of justice and the default sentence also can be altered to three months and it is modified accordingly. We also find that the court below directed payment of fine if realised to be given to PW2 and PW3, who are the widow and mother-in-law of the deceased. But it is hereby ordered that the fine, if recovered, will be paid to PW2, the widow of deceased Jayamohan as compensation.

With the above modification in the sentence regarding fine, we confirm the conviction and the sentence of imprisonment for life imposed against the accused under section 302 IPC.

This appeal is disposed of accordingly.

J.B.KOSHY, JUDGE

K.HEMA, JUDGE

vgs.